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Reamond

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-205111

DATE: February 19, 1982

MATTER OF: First Lieutenant John W. Torpey, AUS, Retired

DIGEST: The Army Board for Correction of Military Records found that a former Army member is entitled to disability retired pay under a new administrative interpretation of applicable law, but made no correction in the member's records so that no new rights accrued. Thus, the member's claim to retired pay first accrued on the date he became entitled to disability retired pay in 1946, not in 1980 when the Board made its finding. Therefore, the barring act of October 9, 1940, as amended (31 U.S.C. 71a), bars payment of that portion of the claim for retired pay which accrued more than 6 years before the claim was received.

This action is to decide whether a correction of military records in 1981 to reflect a service member's entitlement to disability retired pay as of May 10, 1946, enables the member to receive disability retired pay retroactively for the 35-year period or whether the barring act of October 9, 1940, as amended, 31 U.S.C. § 71a bars payment of the amounts accrued more than 6 years prior to the date the claim was filed in this Office. Since the correction of records to reflect entitlement to retired pay resulted from a change in the administrative interpretation of a law and not from a change in the facts set out in the record, the retroactive payments are limited to the 6-year period from the date the claim was filed in this Office.

The case was submitted for an advance decision by J. E. Boone, Special Disbursing Agent, United States Army Finance and Accounting Center, Indianapolis, Indiana, and has been assigned Control Number DO-A-1375 by the Department of Defense Military Pay and Allowance Committee. The service member involved is First Lieutenant John W. Torpey, AUS, Retired.

On March 19, 1946, the Army Retiring Board found that Lieutenant Torpey was permanently incapacitated and that the cause of this incapacity originated while he was serving as an enlisted man in February of 1943. The Secretary of War

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approved the findings on April 18, 1946. Under the administrative interpretation then given the relevant law, the Act of April 3, 1939, ch. 35, § 5, 53 Stat. 557, as amended (see 10 U.S.C. §§ 3687 and 1201), Lieutenant Torpey was not entitled to retired pay since his disability was considered incident to his enlisted service. He, therefore, received a discharge under honorable conditions on May 9, 1946, and he was credited with 4 years 1 month 9 days' active Federal service.

On August 3, 1950, the Secretary of the Army changed the administrative interpretation of the Act of April 3, 1939, with reference to the determination of the line of duty status in cases of non-Regular Army officers and warrant officers to conform to the method authorized in cases of Regular Army officers and enlisted men. Thereafter, in instances of continuous service, where the causes of an individual's disability originated during his enlisted service but continued during his warrant or commissioned service, such incapacities were regarded as an incident of the officer's service. Thus, Lieutenant Torpey became eligible for disability retired pay under this new administrative interpretation.

Apparently, Lieutenant Torpey was not aware of this change in administrative interpretation of the Act of April 3, 1939, for some time since he did not file an application for correction of his military records to reflect retirement in lieu of discharge until May 5, 1978. On March 14, 1980, the Army Board for Correction of Military Records (Correction Board) concluded that Lieutenant Torpey was entitled to disability retirement benefits under the changed interpretation of the law and that his records so indicated without the need for correction by the Board. The Correction Board further indicated that the Commander, Army Finance and Accounting Center, should request an advance decision from our Office regarding Lieutenant Torpey's entitlement to retroactive payments.

After additional administrative processing, Lieutenant Torpey's name was entered on the disability retired rolls and apparently he began receiving monthly retired pay payments commencing on July 1, 1981, and retroactively for 6 years. However, the special disbursing agent has submitted a voucher for disability retired pay for the

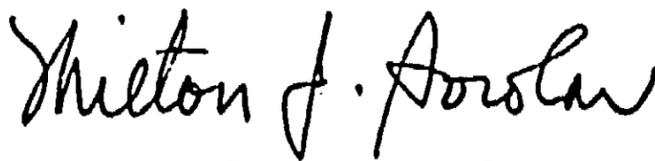
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period more than 6 years prior to July 1, 1981 (May 10, 1946, through June 30, 1975).

By letter of August 10, 1973, the identical issue was presented for resolution in the case of Captain Carl E. Watt, under Department of Defense Military Pay and Allowance Committee Control Number DC-A-1201. In decision B-179467, May 2, 1974, we answered the question in detail.

As is explained in the May 2, 1974 decision, the member's entitlement to disability retirement benefits, such as Lieutenant Torpey's, begins on the day following his original discharge and the action of the Correction Board does not alter this. For a new right to accrue there has to be a change in the underlying facts of the case and not a change in the administrative interpretation of the law. See also 39 Comp. Gen. 178 (1959); 48 Comp. Gen. 235 (1968); and B-191650, May 18, 1978.

Thus, Lieutenant Torpey's right to disability retirement benefits accrued on May 10, 1946, and under 31 U.S.C. § 71a, the portion of his claim for retired pay accruing more than 6 years prior to July 1, 1981, is barred. See B-197603, August 21, 1980. Accordingly, payment on the voucher submitted may not be made.

for 
Comptroller General
of the United States